IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
APPEAL FROM ORDER NO.655 OF 2004

1. Citizen Aster Co-operative Housing Society Limited, having Registration No.TNA/VSI/HSG/TC/ 10354/98-99 dated 30.11.1998 in respect of Building No.B-4 having A, B and C Wings of 46 members.

2. Citizen Jasmine Co-operative Housing Society Limited, having Registration No.TNA/VSI/HSG/TC/ 10390/98-99 dated 22.2.1999 in respect of Building No.C-3 having A, B and C Wings of 46 members.

3. Citizen Sunflower Co-operative Housing Society, having Registration No.TNA/VSI/HSG/TC/ 10325/98-99 dated 4.9.1999 in respect of Building No.C-14, having A, B and C Wings of 46 members, All having their address at Juchandra Naigaum (E), Taluka (Vasai), Dist.(Thane). .. Appellants

Vs.

1. Fredrick J. D'Souza,

2. Leslie J.H. Lobo,

3. Smt.Hazel Francis,

4. Arlene Francis,

5. Darryl Francis and

6. Andre Francis, Respondent Nos.1 to 6 having their office at Catherina Apartments, Ground floor,

78 Chappel Road, Bandra,)
Bombay 400 050.)

7. M/s.Sea Link Construction Pvt.)
Ltd., a Private Limited Company)
registered under the Indian)
Companies Act, 1956 having its)
registered office at)
Mittal Tower, 'B' Wing,)
16th Floor, Nariman Point,)
Bombay 400 021.)

8. Thomas Pereira,)
residing at Marydale, 2nd Floor,)
25th Road, T.P.S.III, Bandra,)
Bombay 400 050.)

9. Maxie Fernandes,)
Residing at 3/20, Dr.Cooper)
Hospital, Juhu, Bombay 400 056.)

10. Citizen Lotus Co-operative)
Housing Society Limited,)
having Regsitration)
No.TNA/VSI/HSG/TC/10351/98-99)
dated 21.11.1998 in respect of)
Building No.B-2 having A, B and)
C Wings of 46 members.)

11. Citizen Lily Co-operative)
Housing Society Limited,)
having Registration)
No.TNA/VSI/HSG/TC/10344/98-99)
dated 9.11.1998 in respect of)
Building No.B-3 having A, B and)
C Wings of 46 members.)

12. Citizen Iris Co-operative)
Housing Society Limited,)
having Regsitration)
No.TNA/VSI/HSG/TC/10843/2000)
dated 15.4.1998 in respect of)
Building No.C-2 having A, B and)
C Wings of 46 members.)

13. Citizen Daisy Co-operative)
Housing Society Limited,)
having Regsitration)
No.TNA/VSI/HSG/TC/10385/98-99)
dated 15.2.1999 in respect of)

Building No.C-4 having A, B and)
C Wings of 46 members.)

14. Citizen Rose Co-operative)
Housing Society Limited,)
having Regsitration)
No.TNA/VSI/HSG/TC/10351/98-99)
dated 9.11.1998 in respect of)
Building No.D-1 having A, B and)
C Wings of 46 members.)
All having their registered)
address at Village Juchandra,)
Naigaon (East), Taluka Vasai,)
District Thane.)

15. Gerald Martin Coelho,)
having his office at 14,)
Ismail Building, 3rd Floor,)
381, Dr.D.N.Road, Fort,)
Bombay 400 001.)

16. Benjamin Cyril D'Souza,)
Residing at Peter Dias Road,)
Bandra (West),)
Bombay 400 050.)

17. Mathew Stephen D'Mello,)
Residing at D'Mello Cottage,)
Roshan Nagar, Chandavarkar Road,)
Borivli (West), Bombay 400 092.)

18. Citizen Bluebell Co-op.Hsg.)
Society Ltd., having office at)
TNA/VSI/HSG/TC/10892/No.C-1A,)
B & C wings of 46 members.).. Respondents

--
Shri A.K.Abhyankar i/b M/s.Thakore Jariwala & Associates for the appellants.

Shri J.B.Chinai, Sernior Advocate with Shri Vijay Pandey i/b Shri Pankaj S.Shah for the respondent No.7.
--

CORAM :R.M.S.KHANDEPARKAR, J

DATED : 3RD NOVEMBER, 2004.

JUDGMENT:

1. Heard the learned advocates for the appellant and the respondent No.4. Perused the records.

2. The appellant challenges the order dated 14th May, 2004 passed by the District Judge, Palghar, dismissing the application for temporary injunction. The same was filed in a representative Suit No.872 of 1996. The said suit has been filed under Order I Rule 8 of the Code of Civil Procedure, 1908 for and on behalf of all the members of the proposed Citizen Aster Co-operative Housing Society comprising of the members belonging to Catholic Community.

3. It is the case of the appellant that the respondent Nos.1, 2 and one Miles Ignatius Francis acting as co-ordinators proposed to form a large society for members of the catholic community with a view to provide them with low cost housing along with all amenities such as Church, Schools, Hospitals, clubhouse, Cemetery, playgrounds etc. by acquiring a large plot of land at Naigaum. About 10,000 members were enrolled and a sum of approximately Rs.12 crores was collected. The said co-ordinators acquired rights in respect of 60 acres of land for and on behalf of

the said proposed society. The coordinators allegedly committed default in providing housing and other amenities to all the members of the proposed society and attempted to transfer the land to the respondent No.7, and therefore, the said suit being a representative suit came to be filed in the year 1996 by the respondent Nos.15, 16 and 17 and therein the application for temporary injunction came to be filed, which however was dismissed by the lower Court by its order dated 31st August, 2000. The appellants are also the members of the proposed society and they managed to get certain documents and further that though the 37 buildings meant for housing the members of the said society were completed, the amenities and the facilities like Church, Schools, Hospitals, Cemetery, etc. were not constructed and the areas earmarked for such facilities were being usurped by the respondent No.7 to construct buildings and to sell flats therefrom to the outsiders. The appellants therefore filed the application for temporary injunction to restrain the respondent No.7 from selling the premises from the said land. The lower court, however, after hearing the parties, has dismissed the said application for temporary injunction. Hence, the present appeal.

4. It is the contention of the appellants that the respondent Nos.1 to 6 in collusion with the respondent No.7 have committed breach of trust and are in the process of usurping the properties belonging to the proposed society and other members of Citizen Co-operative Housing Society Limited (proposed) for and for whose benefit the said property was agreed to be acquired by the respondent Nos.1 and 2 and one Mr.Miles Fernandes, since deceased, from and out of the funds collected by the members of the proposed society and entrusted to them in trust for the said proposed society. The suit having been filed in representative capacity after obtaining leave under Order 1 Rule 8 of the Code of Civil Procedure and the appellants being the members of the proposed society, and as such the beneficiaries on whose behalf the suit has been filed and therefore are entitled for the reliefs claimed by them in this application. It is their further contention that though the earlier application for the similar relief of temporary injunction was dismissed, they have now come across several documents which were not previously available with them and the said documents establish that the entire 60 acres of land exclusively belong to the

proposed society and inspire of that, the respondent Nos.1 and 2 and the original defendant No.1 have illegally agreed to alienate a portion of the said property and have entrusted the same for development activities to the defendant No.4 so that later can construct the buildings and sell them to the outsiders thereby depriving the members of the proposed society the area of about 38 acres of land out of 60 acres of land. Though the earlier application for temporary injunction was dismissed, nothing prevents the appellants from seeking similar relief of temporary injunction as the lower Court while dismissing the earlier application had clearly recorded a finding that the plaintiffs had not brought on record any documentary evidence to show that the plaintiffs had any right, title or interest in the part of the suit land which has been sold out by the defendant Nos.1 to 3 in favour of the defendant No.4. The documents which have now came to light disclose sufficient interest in favour of the members of the proposed society in the said part of the land and in favour of such members including the appellants, and therefore, there is a change in the circumstances which entitles the appellants to file a fresh application for temporary injunction and the Court below having

ignored the same while rejecting the application for temporary injunction has acted illegally and has passed the impugned order contrary to the materials placed on record, and in contravention of the principle of law to be followed while dealing with the application for temporary injunction.

5. Undoubtedly, this is a case where the appellants have sought relief in the nature of temporary injunction much after filing of the suit and in the circumstances when the lower Court, having once considered the case of the plaintiffs, and had refused the similar such relief. It is pertinent to note that the suit has been filed under Order 1 Rule 8 of the Code i.e. in a representative capacity and it is for the benefit of the plaintiffs as well as the appellants who are the defendants in the suit.

6. It is well settled that an order relating to temporary injunction, either grant or refusal, is in exercise of discretion of the Court, and the appellate court is not supposed to substitute its own discretion for that of trial court except where the discretion is shown to have been exercised by the lower court arbitrarily or capriciously or where the Court

exercising its discretion had ignored the settled principles of law regulating grant or refusal of temporary injunctions. Indeed, the Apex Court in **Wander Ltd. & Nr. v. Antony India P.Ltd.,** reported in 1990(Supp) CC 727 had held that "an appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion." The Apex Court in that regard had also referred to the observations in its earlier judgment in **Printers (Misfire) Private Ltd. v. Pothan Joseph,** AIR 1960 SC 1156 where it was held that "these principles are well established, but as has been observed by Viscount Simoon in Charles Osenton & Co. v. Jhanaton (1942 AC 130) '.....the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and

any difficulty that arises is due only to the application of well settled principles in an individual case." Being so, the contention on behalf of the appellants in relation to the impugned order, therefore, will have to be considered bearing in mind the law laid down by the Apex Court in the above judgments.

7. The lower court while dismissing the application for temporary injunction has clearly taken note of the dismissal order passed in the earlier application for temporary injunction viz. Exhibit-5 on the lower Court’s file on 31st August, 2000. It has been also observed that in the application Exhibit-5, the plaintiffs have sought for the same relief which has been prayed for by the appellants in the present application and only difference is that, in the application Exhibit-5, it was the allegation to the effect that the defendant Nos.1 to 3 had no right, title or interest to sell the land to the defendant No.4 and consequently that the defendant Nos.1 to 3 had sold out at the lowest price of Rs.55/- per sq.ft. as against the prevailing rate of Rs.100/- per sq. ft. It has been clearly observed that in the earlier application, the basis to claim relief was that the

property was to be acquired by the defendant Nos.1 to 3 in trust for the proposed society and the same arguments and the contentions are sought to be advanced in support of the present application.

8. Apart from the fact that this is an appeal against the order passed in discretionary exercise of jurisdiction, it is to be noted that undisputedly this is the second application for temporary injunction in the same suit. Undoubtedly, the first application filed by the plaintiffs was dismissed on merits. The suit has been filed for the benefit not only for the plaintiffs but also for the appellants who have filed the present application. In other words, the earlier order not only binds the plaintiffs but also the appellants herein. The sole basis for filing the present application is that the appellants have now come across several documents which justify the relief asked for even though it was refused earlier. At the outset, it is to be noted that no such plea was raised in the application itself. This plea had been raised for the first time in the rejoinder filed by the appellants to the respondents' reply to the appellants' application for temporary injunction. It is well settled that the contents of the rejoinder do

not form part of the pleadings but they form part of the materials in support of the pleadings of the party. Being so, the application itself does not disclose the said ground and it is well settled that the party is not entitled to lead evidence beyond the scope of the pleadings, equally applies even to the miscellaneous proceedings in a suit, and therefore, the appellants cannot justify claim for temporary injunction by the second application on the basis of the plea regarding documents sought to be raised only in the rejoinder, and not in the application itself.

9. Even assuming that the appellants are entitled to raise the point in respect of the availability of the documents as a justification for relief under the second application, it is to be noted that the application under consideration for injunction was filed on 11th September, 2003. The respondents had filed their reply on 21st November, 2003. The appellants filed their rejoinder on 5th December, 2003 wherein for the first time, they disclosed about the ground relating to the availability of the documents and the same read as under:-

"These defendants also now came across several

documents which were previously not available with these defendants."

Apart from the above quoted statement, the appellants have not bothered to disclose the source of knowledge in relation to such documents, the day or the month or the year when they came to know about such documents and justification for acquiring knowledge in relation to the said documents at the stage of filing of the rejoinder and how the documents which can be said to be made available to the appellant in or after December, 2003 could justify the second application for temporary injunction filed in the month of September, 2003. The appellants have not bothered to place on record anything in that regard. In other words, the claim regarding acquisition of recent knowledge in relation to the alleged documents to the appellants is totally without any material in support to such claim and in the face of the first application having been rejected and in the absence of any material in support of second application for the same relief being disclosed by the appellants, adverse inference is liable to be drawn in the matter.

10. It is well settled principles of law that the

principles of res judicata can be invoked not only in separate subsequent proceedings but it is also attracted at subsequent stage of the same proceedings, and once an order made in the course of a proceeding becomes final, it would be binding at the subsequent stage of the same proceeding. This is very clear from the ruling of the Apex Court in **Y.B.Patil & Ors. v. Y.L.Patil,** reported in AIR 1977 SC 392. The Apex Court has also ruled in **Prahlad Singh v. Col.Sukhdev Singh,** reported in AIR 1987 SC 1145 that it is well settled that the decision given by a Court at an earlier stage of a case is binding at a later stage though interlocutory judgments are open for adjudication by an appellate authority in an appeal against the final judgment.

11. In the case in hand, undisputedly, the plaintiffs for their benefit and for other members of the proposed society which included the appellants herein had filed the application for temporary injunction which was dismissed by the lower court by order dated 31st August, 2000 and no appeal was filed against the said order and therefore the same has attained finality for all purposes during the pendency of the suit. Undisputedly, while dismissing the said

application for temporary injunction, the trial Court had held that "at this stage it is very difficult to hold that defendant Nos.1 to 3 are not at all authorised to sell the part of the suit land to the defendant no.4." Apparently, therefore, the trial Court had dismissed the application holding that there was no material to disclose that the defendant Nos.1 to 3 had no right to sell the part of the suit land to the defendant No.4. The said finding for all purposes in the absence of an appeal against the said order had attained finality. However, it is sought to be contended on behalf of the appellants that while arriving at the said finding the trial Court had also observed that the said finding was "at this stage" thereby to mean that the said finding was arrived at on the basis of whatever materials which were available prior to the passing of the said order and the appellants have now produced some documents which disclose that the defendant Nos.1 to 3 are not entitled to sell part of the suit land to the defendant No.4.

12. As already observed above, the appellants cannot justify the claim solely on the basis of the alleged documents as no such plea was raised in the

application itself and the plea in that regard has been sought to be raised only in the rejoinder. Secondly, even assuming that the said documents can be said to be relevant for the matter in issue, they were in existence much prior to the filing of the suit itself. One of the documents is an advertisement dated 24th October, 1992. Some are the letters dated 28th October, 1988 and 4th April, 1989, and the brochure dated 7th January, 1989 and Power of Attorney dated 13th September, 1989, besides, some other documents which were already referred to in the earlier order. Once it is clear that all these documents relate to the date prior to the filing of the earlier application and there being no disclosure by the appellants as to the point of time when the appellants came to know about the said documents as well as the source of knowledge about the said documents, not only in the application for temporary injunction but even in the rejoinder itself, there can be no justification to grant any relief in the second application for temporary injunction based on such documents.

13. Besides, the rule of constructive res judicata will also be attracted in such cases and more

particularly the one comprised under the Explanation IV to Section 11 of the Code of Civil Procedure which states that "any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit." In other words, any matter which might or ought to have been made a ground of attack in the former application shall be deemed to have been a matter directly and substantially in issue in such application and failure in that regard on the part of the plaintiffs in the earlier application would disentitle others for whose benefit representative suit is filed to reagitate the same issue in the form of second application for temporary injunction.

14. The Apex Court in **Forward Construction Co. & Ors. v. Prabhat Mandal (Regd.) Andheri & Ors.,** reported in AIR 1986 SC 391 has held that " an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming within the

legitimate purview of the ordinal action in both in in respect of the matters of claim or defence. The principle underlying Explanation IV is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. It is true that where a matter has been constructively in use it cannot be said to have been actually heard and decided."

15. The Apex Court in **Gulam Abbas and Ors. v. State of U.P. and Ors.,** reported in AIR 1981 SC 2198 had clearly on the principle of res judicata ruled that "It is in the interest of the public at large that finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation."

16. In **Gulabchand Chhotalal Parikh v. State of Bombay** (AIR 1965 SC 1153) and in **Union of India v. Nanak Singh,** (AIR 1968 SC 1370), it was held that "It is thus clear that Technical aspects of Section 11 of C.P.C., as for instance, pecuniary or subject-wise

competence of the earlier forum to adjudicate the subject-matter or grant reliefs sought in the subsequent litigation would be immaterial when the general doctrine of res judicata is to be invoked."

17. In **Gulab Abbas's case (supra)**, it was held by the Apex Court that ".....the provisions of Section 11 of C.P.C. are not exhaustive with respect to an earlier decision operating as res judicata between the same parties on the same matter in controversy in a subsequent regular suit and that on the general principle of res judicata, any previous decision on a matter in controversy, decided after full contest or after affording fair opportunity to the parties to prove their case by a Court competent to decide it, will operate as res judicata in a subsequent regular suit."

18. Applying the law on the point of res judicata, and considering the fact that the application for temporary injunction filed by the appellants is on the same grounds which were disclosed in earlier application, and further that the application of the appellants, apart from making a bare claim of change in circumstances, does not disclose any change as such

after disposal of the earlier application, the second application was liable to be dismissed and was rightly dismissed by the trial Court.

19. Though it was sought to be strenuously argued on behalf of the appellants that the documents disclose change in circumstances, fact remains that while dismissing the earlier application, the trial court had also observed that "no such documents are produced on record to show that the members of the proposed society are owners of the suit land." The entire case in the earlier application was that the piece of land of 60 acres was sought to be acquired by the defendant Nos.1 to 3 in trust for the proposed society and while considering the said case, the above finding was arrived at by the trial court. It is the contention that the present documents sought to be brought on record reveal a different story. In what manner they reveal different story has not been pointed out except contending that in view of the agreement between the erstwhile owner of the property and the defendant Nos.1 to 3, the property was acquired by the defendant Nos.1 to 3 for the benefit of the proposed society. It is pertinent to note that while dismissing the second application, the trial

court has made the following observations, which obviously disclose lack of bonafide on the part of the appellants in approaching the court with the second application for temporary injunction and those observations read thus:-

> The plaintiffs and the present defendants have frankly admitted that the defendants No.1 to 3 sold 30 acres of Northern side to the defendant No.4 for valuable consideration under a registered sale-deed. Not only this document explicit that the defendant No.4 had given huge amount to plaintiffs, present defendants/applicants and other flat owners for completion of 37 undisputed flats. Further record shows that all the 37 flat owners are enjoying the ownership of the flats. Moreover, the record shows that under what circumstances the defendant Nos.1 to 3 were constrained to sell the remaining disputed land to the defendant No.4. If the defendant Nos.1 to 3 had not taken assistance from the defendant No.4, 1700 persons would have been deprived from their flats. Therefore, at this juncture it can see that

> the act done by the defendants No.1 to 3 to sell the remaining land to defendant No.4 is just and proper. As I stated in para supra no relief is sought by the present defendants/ applicants from this Court. There is no issue which has to be adjudicated by this Court involved in between the defendant Nos.1 to 3 and present defendants. Therefore, I have no hitch to state that the present applicants/ defendants failed to make out a prima facie case."

. Obviously, it is apparent that the appellants having now acquired the premises and having made the defendant No.4 to incur expenditure for construction of such buildings for the occupation thereof by the persons including the appellants, have approached the Court with the second application for temporary injunction, which apparently discloses lack of bonafide.

20. In case the appellants were not in possession of the relevant documents at the time when the suit was filed and the earlier application for temporary injunction was taken up for hearing, nothing prevented

the appellants or the plaintiffs in the suit to call upon the respondents to produce such documents if it was to the knowledge of the appellants that such documents disclose any right in favour of the appellants in relation to the suit property. Admittedly, not even an attempt was made to call upon the respondents to produce such documents by taking resort to the provisions of law comprised under Order 11 of the Code of Civil Procedure nor any justification has been disclosed for hesitation on the part of the appellants to take such steps before the disposal of the earlier application for temporary injunction. It is pertinent to note that no such steps had been taken even till the date of filing of the present application for temporary injunction.

21. The decision of the Apex Court in **Arjun Singh v. Mohindra Kumar & Ors.,** reported in AIR 1964 SC 993 held that the injunctive orders are certainly capable of being altered or varied by subsequent applications for the same relief, but it is permissible only on proof of new facts or new situations which subsequently emerge. Merely because the appellants are seeking to produce some documents at a later stage, that does not amount to emerge "new facts" or

"new situations." The facts or the situations remain the same as they were, at the time when the earlier application was disposed of. It is only that the appellants are now seeking to produce additional evidence in support of the same claim. Additional evidence cannot amount to new facts or new situations. Undisputedly, these documents were in existence even at the time when the earlier application was disposed of. Certainly by taking resort of the Order 11 of the Code of Civil Procedure, the appellants could have brought these documents on record at the time of the disposal of the earlier application. Being so, there are neither new situations nor new facts which would warrant alteration of the earlier order refusing the temporary injunction.

22. The decision of the Rajasthan High Court in **Madan Lal Khuteta v. Badri Narayan,** reported in AIR 1988 Rajasthan 61 is based on the decision of the Apex Court in **Arjun Singh's case** and does not lay down any different proposition of law.

23. The decision of Gauhati High Court in **Sudhir Kumar Das & Ors. v. Amitava Dhar,** reported in AIR

1983 Gauhati 52 rather than assisting the petitioners justifies the rejection of the appeal. It was held therein that "To allow the same matter to be agitated, may be in the name of a different person, would definitely be an abuse of the process of the court as the attack is founded on same facts." The decision clearly justifies not only the dismissal of the appeal simplicitor but also requires further observation that the application for temporary injunction by the appellants and this appeal are nothing but the abuse of the process of the court for the reasons stated above. Besides, in the facts and circumstances of the case, the present application discloses that the respondents are being vexed once again for the same cause of action without any justification and the same also amounts to an abuse of the process of Court by the appellants, and hence, the appeal deserves to be dismissed with exemplary costs.

24. For the reasons stated above, there is no case for interference in the impugned order and therefore, the appeal is dismissed with exemplary costs of Rs.10,000/- (Ten Thousand). The costs shall be deposited by the appellants within a period of four weeks from today and on deposit of such costs, the

same shall be credited to the account of Maharashtra State Legal Aid Services Authority.